Supreme Court, U. S.
FILED
APR 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1284

RUSSEL JAMES GAUDET,
Petitioner,

versus

EXXON CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

GENE S. PALMISANO
P. O. Box 60626
New Orleans, La. 70160
Attorneys for Respondent,
Exxon Corporation

OF COUNSEL:
BERNARD J. CAILLOUET
ELLIOTTE M. HAROLD, JR.
IVAN DAVID WARNER, III
P. O. Box 60626
New Orleans, La. 70160
JACK J. COUSIN
209 French Street
New Iberia, Louisiana

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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OPINIONS BELOW

The ruling of the District Court granting respondent's motion for summary judgment, reprinted as Appendix A of Petition, is unreported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's App. C) is reported at 562 F. 2d 351.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The pertinent provisions of the Outer Continental Shelf Lands Act, as amended (43 U.S.C. §§1331(a), (b), and (c)), and the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U.S.C. §§904, 905(a), 930(a) and (i)), are set forth in the Petition at Appendix F.

QUESTIONS PRESENTED

1. Whether a plaintiff's remedies against a third party for injuries received on an offshore platform are properly found in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) once a Court has determined, pursuant to the Outer Continental Shelf Lands Act (Lands Act), under State law, that he is the borrowed servant of that third party.

2. Whether the status of borrowed servant is properly determined by the Court when there is no genuine issue as to any material fact.

3. Whether the factors involved in a determination of borrowed servant status are to be weighed as appropriate in each particular case rather than using some "fixed test."

4. Whether respondent's motion for summary judgment was properly granted where all necessary undisputed facts existed in the record for the Court to make a determination of the borrowed servant status of the plaintiff.

REASONS FOR DENYING CERTIORARI

1. Petitioner's status was determined under the Lands Act applying State law. Once status was determined, the Lands Act itself directed the use of the LHWCA which provides petitioner's remedies.

2. There is no conflict among the circuits as to the determination of the status of borrowed servant under the Lands Act.

3. The granting of summary judgment was proper because there were no genuine issues as to any material fact.

STATEMENT OF THE CASE

Respondent is the owner of a complex of eight fixed oil production platforms, known as West Delta Block 73, located on the Outer Continental Shelf in the Gulf of Mexico, seaward of the State of Louisiana.

Petitioner, an employee of Tidelands Marine Service, Inc., had been regularly employed at this complex for some fourteen (14) years when he sustained the injury on which the instant lawsuit is based.

Petitioner has filled many positions during his years on the Exxon platforms but at the time of his in-

jury he was a member of an Exxon Instrumentation (I & E) Group. This is a group of men who regularly perform special inspection and maintenance work on the numerous safety devices and controls installed on the platforms. As mineral lessee of the Federal Government and as platform owner, Exxon has the responsibility for these safety measures pursuant to regulations imposed by the United States Geological Survey.

Petitioner was the only Tidelands Marine Service, Inc. employee involved in this type of work at the West Delta Block 73 complex. All other members of petitioner's group were regular Exxon employees. The group worked under Exxon's field foreman and field superintendent.

When not involved in these primary duties, the members of the I & E Group performed other tasks as directed by Exxon's field foreman. Among these other jobs were general maintenance and repair work, crane operation, clean-up work, and even work in other job categories such as operation of the production facilities. On the day of his accident, petitioner had been sent to another platform by the Exxon field foreman to perform one of these supplemental jobs. He was injured when a barrel fell from a rack and struck his knee.

Petitioner filed a claim against Tidelands Marine Service, Inc. under the LHWCA, 33 U.S.C. §904, and received the benefits provided therein. He also filed suit against respondent, Exxon Corporation, in the United States District Court for the Western District of Louisiana. By Amending and Supplemental Com-

plaint, petitioner alleged that the jurisdiction of the Federal Court was found in the Lands Act, 43 U.S.C. §1333.

REASONS FOR DENYING CERTIORARI

1. Petitioner's Status Was Determined Under The Lands Act Applying State Law. Once Status Was Determined, The Lands Act Itself Directed The Use Of The LHWCA Which Provides Petitioner's Remedies

It is clear from a careful reading of the District Court's ruling and the decision of the Fifth Circuit that there has been no error in the result reached by the Lower Courts. Perhaps not every step in the Court's reasoning process was committed to writing, but this decision should not be reviewed by this Honorable Court, since a reading of the two Statutes (Lands Act and LHWCA) gives ample authority for the Courts' rulings.

It should be noted at the outset that the sole specification of error presented to the Fifth Circuit was that the lower Court held that there was no genuine issue as to a material fact and therefore erred in granting summary judgment. Petitioner has seized upon certain language in the opinion of the Fifth Circuit and used that language to raise in this Court, for the first time, the issue of whether his status as a borrowed servant was decided under the Lands Act or the LHWCA. This issue was not briefed below and it is inappropriate to now urge it. *State v. Taylor*, 353 U.S. 553 (1957); *Lawn v. United States*, 355 U.S. 339 (1958);

Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967). It is submitted that the reason this issue was not raised below was that petitioner's status had been determined under the proper law by the lower Court.

However, assuming *arguendo* that this issue had been properly preserved, there is nothing to indicate error. Petitioner claims that his status as a "borrowed employee" of Exxon was determined by the Fifth Circuit using Federal standards pursuant to the LHWCA rather than State standards as commanded by the Lands Act.

What is ignored, of course, is that the Fifth Circuit did not determine petitioner's status. This was determined in the lower Court. The Fifth Circuit upheld this determination. Thus, any complaint as to the method of determination should have been raised in the Appeals Court. But, petitioner is not complaining that the lower Court erred and that the Fifth Circuit compounded this error. What he is complaining of is that the language of the Fifth Circuit opinion, conceivably, may be open to more than one interpretation. However, no matter how the language is interpreted, the fact remains that the only action the Appeals Court took was to uphold a perfectly correct decision. By complaining of the Fifth Circuit's method of "determining" his status, rather than having complained below of the lower Court's method, petitioner is simply saying that the Appeals Court was right for the wrong reason. This Court should not now address itself to an issue not raised below simply because the Appeals Court's language was unsatisfactory to petitioner.

The decisions below clearly show that it was not until petitioner's status had been determined that the LHWCA was looked to to determine his remedies. That this is proper is admitted by petitioner in his brief (p. 7).

Because petitioner was injured on an offshore platform, he looked to the Lands Act for redress. Vis-a-vis his general employer, Tidelands Marine Service, Inc., the Act indicated that he should look to the LHWCA for his remedies. This he did and received the benefits outlined in that Act. As to any other party, the Lands Act directed him to the law of the adjacent State, in this case Louisiana.

During the litigation, respondent raised as a defense the question of petitioner's status. The concept of "borrowed servant" is well recognized in Louisiana. *Benoit v. Hunt Tool Co.*, 219 La. 380, 53 So. 2d 137 (1950); *B & G Crane Service v. Thomas W. Hooley & Sons*, 227 La. 677, 80 So. 2d 369 (1955) and the cases cited therein.

Contrary to petitioner's statement, Louisiana law and Federal law use the same criteria for determining borrowed servant status. *Champagne v. Penrod Drilling Company*, 341 F. Supp. 1282 (W. D. La., 1971), aff'd. 459 F. 2d 1042 (5th Cir., 1972). The trial court recognized that the criteria are the same. (Petitioner's App. 1A). Using these criteria and finding no essential facts in dispute (Petitioner's App. 2A) the Court determined that petitioner was a "borrowed employee" of Exxon.

Once this determination was made pursuant to State law, petitioner's remedies were the same as those of any other employee of Exxon injured on an offshore platform. The Lands Act specifically provides that those remedies are found in the LHWCA and consist of compensation payments. Petitioner does not deny that he received such payments. Whether these benefits were paid by Exxon, Tidelands, or an insurer, is of no moment.

Petitioner cites a number of cases supposedly holding that borrowed servant status is a question of fact in Louisiana. Two of these cases, *D'Antoni v. Sara Mayo Hospital*, 144 So. 2d 643 (La. App., 1962), and *Grant v. Touro Infirmary*, 254 La. 204 (1969), simply do not address that question. A third, *Danks v. Maher*, 177 So. 2d 412 (La. App., 1965), erroneously cites *D'Antoni* as authority. The other three cases cited are distinguishable in that they each involved disputed facts.

In the instant case, the facts were not in dispute (Petitioner's App. 2A-3A). In such a situation, it is appropriate under Louisiana law that the judge determine status. *Owens v. AAA Contracting Company*, 219 So. 2d 226 (La. App., 1969); *Kiff v. Travelers Insurance Company*, 402 F. 2d 129 (5th Cir., 1968).

Petitioner states that it is "immediately imperative that the duties and responsibilities of those who operate offshore platforms toward those who work on them be properly established." It is submitted that the duties of those operating offshore platforms to those who work on them have been properly established by

the Congress by enacting into law the Lands Act and the LHWCA. There is no evidence that any further laws are needed because of exploratory operations along the Eastern Seaboard. Mere speculation that present laws may sometime in the future prove inadequate is no reason for the involvement of this Court to review this case.

2. There Is No Conflict Among The Circuits As To The Determination Of The Status Of Borrowed Servant Under The Lands Act

Petitioner states that the Fifth Circuit "recognized that one of its own earlier rulings, *Guidry v. Texaco, Inc.*, 430 F. 2d 781, 784 (5th Cir., 1970), had held to the contrary," (Petitioner's brief p. 12), i.e., that the existence of a borrowed servant relationship is a matter of fact. This was not the reason for the Fifth Circuit's mention of *Guidry*. Rather, the Court cited *Guidry* simply to show that summary judgment is not proper when there is a dispute as to material facts. *Guidry* was cited because it was in contrast to the instant case not because it was in conflict with it.

The *Guidry* case was decided by the judge, sitting without a jury, on the basis of a disputed record. He found that plaintiff was not a borrowed servant of defendant. The Fifth Circuit, very reluctantly, affirmed:

> "The findings recited above were made on disputed evidence given by live witnesses in the presence of the district judge. After reviewing the evidence, we are not able to say that these findings were clearly erroneous." *Id.* at 784.

In attempting to find a conflict among circuits, petitioner has obviously misread the decisions cited by the Fifth Circuit, *Gudgel v. Southern Shippers, Inc.*, 387 F. 2d 723 (7th Cir., 1967) and *McCollum v. Smith*, 339 F. 2d 348 (9th Cir., 1964).

Petitioner states, "In *Gudgel*, the Seventh Circuit in a case involving neither the Lands Act nor LHWCA recognized the borrowed servant issue as one of fact and allowed a jury, under state law, to consider it." (Petitioner's Brief, p. 13).

The question to be decided in *Gudgel* was whether one defendant was the borrowed servant of a second defendant so as to make that defendant liable to plaintiff under the doctrine of *respondeat superior*. Although the question went to the jury, when the jury found that such a relationship existed, the trial court entered a judgment notwithstanding the verdict. In affirming, the Seventh Circuit stated:

> "The evidence in support of Southern Shippers' position is overwhelming." *Id.* at p. 727.
>
> and
>
> "Considering all of the evidence we do not believe the jury could *reasonably* conclude that Freischlag was undertaking the business of Southern Shippers at the time of the collision." *Id.* at p. 726. (Emphasis supplied).

Thus, instead of supporting petitioner's position, *Gudgel* reinforces the Fifth Circuit's position, i.e. when the facts are not in dispute, it is proper that the

question of borrowed servant status be decided by the Court.

Petitioner states that, in *McCollum*, the Ninth Circuit held that whether there was a change of masters was one of fact *when the facts are debatable*. (Emphasis supplied). This is a fair statement although it is more *dicta* than holding.

However, as in the instant case, the facts were not debatable and the Ninth Circuit affirmed the trial court's granting of a directed verdict. After discussing the concept of borrowed servant, the Court stated:

> "A careful consideration of the entire record in the light of these propositions makes manifest the conclusion that Choy was the servant of Concrete, so far as the outcome of this case is concerned.' 339 F. 2d 348, 352.

The Court also stated:

> "In conclusion, we are fully satisfied that the trial judge *correctly appraised the evidence* and that his ruling was right." *Id.* at p. 352. (Emphasis supplied).

Thus, in the instant case, the Fifth Circuit upheld the grant of summary judgment on the question of borrowed servant status when the facts were undisputed. In support thereof, it cited a Seventh Circuit decision upholding the entry of a judgment NOV and a Ninth Circuit decision affirming a directed verdict on the same issue. Rather than being in conflict, as petitioner alleges, all three decisions are in perfect harmony.

Even were there a conflict among circuits, petitioner would find scant comfort in that fact. Each of the cases involved, *Gudgel*, *McCollum*, and *Gaudet* interpreted State law; the first two because they were diversity actions and this case because it was filed under the Lands Act. To find differences among State laws is not unusual. It is stretching a point to state that such differences in State laws establish the conflict between or among the circuits that has been an historical reason for granting certiorari. As this Court has stated:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

Also, there is no question of which criteria to apply in deciding the status of borrowed servant. Almost seventy years ago this Court held that:

> ". . . we must inquire whose is the work being performed, — a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221-222 (1909).

Through the years, these criteria have been honed and refined, expounded on and made clearer until today, in the Fifth Circuit, nine factors are evaluated. *Ruiz v. Shell Oil Co.*, 413 F. 2d 310 (5th Cir., 1969). This does not mean that a numerical weight is to be given

each factor and that when some magic score is reached a worker becomes a borrowed servant. Rather, all factors are to be weighed as may be appropriate in a given case. No "fixed test" is used. *Champagne v. Penrod Drilling Co.*, 341 F. Supp. 1282 (W. D. La., 1971), aff'd 459 F. 2d 1042 (5th Cir., 1972).

The Fifth Circuit clearly held in *Ruiz*, supra, that:

> "Nor is there any evidence which could be inferred to create a borrowed-servant relationship between National and Ruiz. All the facts being overwhelmingly to the contrary, the court correctly refused to submit this issue to the jury. Boeing Co. v. Shipman, 5 Cir., 1969, 411 F. 2d 365. This Circuit, the Seventh and Ninth Circuits have, in the absence of substantial evidence to the contrary, held the issue of whether a relationship of borrowed servant existed is a matter of law. Kiff v. Travelers Insurance Company, 5 Cir., 1968, 402 F. 2d 129; Gudgel v. Southern Shippers, Inc., 7 Cir., 1967, 387 F. 2d 723; McCollum v. Smith, 9 Cir., 1964, 339 F. 2d 348."

The point is that where the necessary facts are not in dispute, as they are not here, the Court rules on this issue as a matter of law.

3. The Granting Of Summary Judgment Was Proper Because There Were No Genuine Issues As To Any Material Fact

Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment where the moving par-

ty is entitled to judgment as a matter of law, where it is quite clear what the truth of the case is, and where no genuine issue remains for trial. The Rule does not cut litigants off from their right to a trial by jury if it is determined from the facts that are before the Court that there are no genuine material facts in dispute. *Poller v. Columbia Broadcasting System*, 368 U.S. 467 (1962). See also *Cates v. Beauregard Electric Co-operative, Inc.*, 328 So. 2d 367, La. Sup. Ct. (1976).

Subsection "E" of Rule 56 should be specifically noted in that it states with particularity the following:

> "..... When a Motion for Summary Judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The key issue of whether or not a motion for summary judgment should be granted is based on the facts before the Court and whether or not those facts are in dispute. It was determined by two tribunals, the District Court (Petitioner's App. A) and the Fifth Circuit Court of Appeals (Petitioner's App. C), that the issues before them were not in dispute and that as a matter of law, petitioner was the "borrowed servant" of Exxon and that his sole remedy was under the LHWCA.

CONCLUSIONS

We respectfully urge that for each of the above reasons the Court should not grant Certiorari and should affirm the Judgment of the Lower Court.

Respectfully submitted,

GENE S. PALMISANO
Counsel for Respondent
Post Office Box 60626
New Orleans, Louisiana 70160

OF COUNSEL:

BERNARD J. CAILLOUET
ELLIOTTE M. HAROLD, JR.
IVAN DAVID WARNER, III
P. O. Box 60626
New Orleans, La. 70160

JACK J. COUSIN
209 French Street
New Iberia, Louisiana